No. 328 MISC.

AUBRY WILLIAMS, Petitioner,

v.

STATE OF GEORGIA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia, entered in the above-entitled case on July 15, 1955. On October 12, 1955, Mr. Justice Clark extended the time for filing this petition to and including October 28, 1955.

OPINION BELOW

The opinion of the Supreme Court of Georgia on remand from this Court will be reported in 211 Ga. 763 and 88 S.E. 2d 376, now published in advance sheet form. It is attached hereto as Appendix A.

JURISDICTION

1. The judgment of the Supreme Court of Georgia is dated July 15, 1955, and was entered on the same date. It is appended hereto as Appendix B. The time for filing this petition has been extended by Mr. Justice Clark to and including October 28, 1955.

2. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3) since a right or privilege has been set up or claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the Supreme Court of Georiga, upon the remand to it of the case before this Court last term, Williams v. Georgia, 349 U.S. 375, has obeyed the mandate of this Court to give reconsideration to the case in light of the opinion of this Court.

2. Whether the Supreme Court of Georgia can constitutionally ignore a considered judgment of this Court, rendered after a determination by this Court that it had jurisdiction over the case, and thereby deprive the petitioner of his right to the equal protection of the laws under the Fourteenth Amendment.

3. Whether a state court's views as to the state's sovereign powers under the Tenth Amendment are constitutionally superior to this Court's views as to an individual's rights under the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Art. III, Sec. 1, Constitution of the United States:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish . . .

2. Art. III, Sec. 2, Constitution of the United States:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, . . . In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, ...

3. Art. VI, Constitution of the United States:

> This Constitution . . . shall be the supreme law of the land; and the judges in every States shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

4. Fourteenth Amendment, Sec. 1, Constitution of the United States:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case was before this Court last term, Williams v. Georgia, 349 U.S. 375 (June 6, 1955), and only the highlights of the facts as recorded in this Court's opinion need be repeated at this juncture.

Petitioner, a Negro, was convicted on March 10, 1953, in the Superior Court of Fulton County, Georgia, of the murder of a white man. A formal motion for new trial was filed, amended, overruled by the trial judge, and appealed to the Supreme Court of Georgia. That court affirmed the judgment on October 14, 1953. Williams v. State, 210 Ga. 207, 78 S.E. 2d 521. Petitioner was then sentenced to death by electrocution.

On December 1, 1953, petitioner filed in the trial court an extraordinary motion for new trial (under Ga. Code Ann. §70-303). In this motion it was alleged for the first time that the petitioner had been denied the equal protection of the laws under the Fourteenth Amendment to the United States Constitution by the manner in which the petit jury panel had been selected, the panel from which the jury which convicted him had been chosen. Petitioner alleged that the panel had been selected on February 19, 1953, by a judge of the Fulton County Superior Court by drawing tickets from a box. In that box the names of white persons appeared on white tickets and the names of Negroes appeared on yellow tickets. It was precisely this technique of selection which this Court outlawed as unconstitutional in Avery v. Georgia, 345 U.S. 559, a case also arising out of the Fulton County Superior Court. This Court's decision in the Avery case came more than two months after petitioner's trial on March 10, 1953.

On January 18, 1954, the trial court dismissed the extraordinary motion for a new trial "for the reason that the grounds of the motion did not make out such a case as would authorize the court to hear and consider the same as an extraordinary motion." On appeal to the Supreme Court of Georgia, the judgment of dismissal was affirmed on two grounds: (1) the law of Georgia requires that any challenge to the array of jurors be raised at the time the array is put upon the defendant and before the trial begins and hence precludes making the challenge for the first time in a motion for new trial; (2) the affidavits of the petitioner and his counsel that they did not know of the facts as to the selection of the jury panel at the time of the trial and could not have discovered them in the exercise of ordinary diligence were insufficient to excuse petitioner from the necessity of presenting the challenge before trial. Williams v. State, 210 Ga. 665, 82 S.E. 2d 217.

This Court then granted certiorari. 348 U.S. 854. Oral argument was held on April 18, 1955, during the course of which counsel for the State "agreed that the use of yellow and white tickets in this case was, in light of this Court's decision in Avery, a denial of equal protection, so that a new trial would be required but for the failure to challenge the array." 349 U.S. at 381-382. It was this oral concession that led this Court to remand the case to the Georgia Supreme Court for reconsideration. The majority of this Court felt

that the "acknowledgment by the State before this Court that as a matter of substantive law Williams had been deprived of his constitutional rights" was "an important factor which has intervened since the affirmance by the Georgia Supreme Court." 349 U.S. at 390. And since an examination of Georgia law convinced this Court that the Georgia courts had the power, in their discretion, to grant relief in these circumstances, the case was remanded for reconsideration on the assumption that the courts of Georgia would not "allow this man to go to his death as the result of a conviction secured from a jury which the State admits was unconstitutionally impaneled." 349 U.S. at 391.

In remanding the case, this Court was careful to note the nature of its jurisdiction over the case. Thus it was stated that "where a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right." 349 U.S. at 383. And it was further noted that since the petitioner's extraordinary motion for new trial "was based upon a constitutional objection, and one the validity of which has in principle been sustained here, the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us." 349 U.S. at 389. But, as this Court then stated, 349 U.S. at 389, "the fact that we have jurisdiction does not compel us to exercise it." Because of the intervening and new factor of the State's oral acknowledgment of the denial of petitioner's rights under the Fourteenth Amendment, this Court concluded that further consideration by the Georgia Supreme Court was appropriate.

Thus this Court, in remanding the case, issued a mandate reading as follows:

> It is ordered by this Court that this cause be, and the same is hereby, remanded to the Supreme Court of Georgia for reconsideration in the light of the opinion of this Court. And the same is hereby remanded to you, the said judges of the said Supreme Court of the State of Georgia, in order that such proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of certiorari notwithstanding.

On July 14, 1955, following the remand, petitioner filed in the Supreme Court of Georgia a motion to reverse the judgment of the trial judge

dismissing the extraordinary motion for a new trial. He also moved that the judge be directed to hear the extraordinary motion and, if the evidence sustained the allegations, to grant a new trial. A copy of this motion is appended hereto as Appendix C.

Previously, on June 20, 1955, the Attorney General of Georgia had filed a brief in the Supreme Court of Georgia urging that court to reaffirm its prior decision in Williams v. State, 210 Ga. 665, 82 S.E. 2d 217. In the course of that brief, which is appended hereto as Appendix D, the Attorney General disputed this Court's findings as to the oral acknowledgment made by the State during the argument before this Court. In footnote 1 of the said brief, this Court's finding is labeled as "unfounded" and an attempt is made to recast the argument which was made before this Court. Moreover, the Attorney General argued in the Brief that this Court had misconstrued Georgia law and, based on this alleged error, remanded the case when the only proper course open was dismissal of the case.

Thereupon, without calling for reargument or further briefs, the Supreme Court of Georgia on July 15, 1955, denied petitioner's motion and adhered to its judgment of affirmance rendered May 10, 1954 (210 Ga. 665, 82 S.E. 2d 217). In the accompanying opinion (Appendix A hereto), the Georgia court:

(i) accused this Court of failing to observe the Tenth Amendment;

(ii) stated that this Court had recognized that the Georgia court had decided the case according to established rules of law and that no federal jurisdiction existed authorizing this Court either to affirm or reverse the judgment below;

(iii) stated that this Court had undertaken to remand the case on the theory that Georgia law vested in the trial judge discretion in ruling on an extraordinary motion for a new trial and had concluded that the Georgia court "should reverse the trial court because that discretion was not exercised in the way the Supreme Court would have exercised it";

(iv) stated that the exercise of discretion never authorizes violation of law and that the law here required that the question sought to be raised be asserted before trial and not otherwise; and

(v) stated that "not in recognition of any jurisdiction of the Supreme Court to influence or in any manner to interfere with the functioning of this court on strictly State questions, but solely for the purpose of completing the record in this court in a case that was first decided by us in 1953, and to avoid further delay," its prior judgment is supported by sound and unchallendged law, conforms with the state and federal constitutions and stands as the judgment of that court.

Petitioner thereafter was resentenced to death, the date being set for August 26, 1955. He was unable to secure a stay of execution in the court below, but on August 18, 1955, Mr. Justice Clark of this Court stayed the execution pending final disposition of this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. The foregoing statement of the case makes it plain that the Supreme Court of Georgia has made no attempt to recognize or conform to the mandate of this Court to reconsider its prior judgment in light of this Court's opinion of last term. At no point in its opinion of July 15, 1955, does the Georgia court make any reference to the extraordinary circumstance which caused this Court to remand the case for reconsideration -- the oral acknowledgment by the State that as a matter of substantive law petitioner had not been accorded his rights under the Fourteenth Amendment. No effort is there made to give to this new and extraordinary circumstance the careful consideration contemplated by this Court.

On the contrary, the Georgia court openly flouts the jurisdiction and authority of this Court. It arrogates to itself the power to determine that its prior decision was based solely on state grounds and that such decision was in full conformity with the federal Constitution. It refuses to recognize "any jurisdiction of the Supreme Court to influence or in any manner to interfere with the functioning of this court on strictly State questions." In so doing, the Georgia court has sought to sit in judgment on and to reverse this Court's determination as to the existence of federal jurisdiction over the case. Such a flat defiance of this Court's ruling raises a most basic question as to the supremacy of this Court over state courts on issues arising out of the federal Constitution.[1/]

1/ See, in general, Note, State Court Evasion of United States Supreme Court Mandates, 56 Yale L. J. 574 (1947); Note, Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941, 67 Harv. L. Rev. 1251 (1954).

This Court was explicit as to the nature of its jurisdiction over the case, jurisdiction which entitled it to affirm, reverse or remand for further consideration as it saw fit. Contrary to the Georgia court's statement, this Court expressly held that where a state allows a federal issue to be raised at a late stage and to be determined as a matter of discretion, "we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right." 349 U.S. at 383. Moreover, since petitioner's motion for a new trial raised a substantial federal constitutional issue, "the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us." 349 U. S. at 389. The fact that this Court declined for the moment to exercise its clear jurisdiction in order to permit the state court to give consideration to a new and extraordinary circumstance does not destroy the existence or supremacy of federal jurisdiction. Nor does it permit the state court to ignore this Court's determination of such jurisdiction or to repudiate any direction or order issued by this Court in the case. It was simply not the function or constitutional power of the state court to relitigate the issue as to the presence or absence of federal jurisdiction.

In so refusing to recognize any jurisdiction of this Court in the case, the Georgia Supreme Court has abused a fundamental principle of constitutional law -- the supremacy of this Court on matters involving the federal Constitution and federal jurisdiction. As long ago as 1816, in the historic case of Martin v. Hunter's Lessee, 1 Wheat. 304, this Court gave unanimous voice to this basic and necessary concept. It was there held that the federal Constitution, by its very nature, necessarily contemplates that this Court will be the supreme arbiter of federal issues arising in state court proceedings. And in Cohens v. Virginia, 6 Wheat. 264, the same principle was held applicable as to state criminal cases. The supremacy which Article VI confers upon the Constitution could not be effectively maintained unless there is federal judicial power with corresponding authority and jurisdiction to carry that supremacy into effect. If each state court were to be free to determine which decisions of this Court it desired to respect and which to ignore, the Constitution, laws and treaties of the United States would soon receive different meanings in different states and the Government of the United States

would soon mean one thing in one state and another thing in another. "It was essential, therefore, to its very existence as a Government, that it (the federal Government) should have the power of establishing courts of justice, altogether independent of state power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a state court or a court of the United States, should be finally and conclusively decided." Ableman v. Booth, 21 How. 506.[2/]

And so the Supreme Court of Georgia, in disagreeing with this Court as to the existence of federal jurisdiction and in refusing to obey this Court's mandate, has rendered a judgment inconsistent with the supremacy of the federal Constitution and of this Court. Its decision to ignore this Court's mandate to reconsider its prior judgment is beyond its constitutional power. Its disagreement with this Court's views is constitutionally irrelevant. It thus becomes appropriate and necessary to review the recalcitrant action of the Georgia court by a writ of certiorari in order that the supremacy of the federal Constitution and the authority of this Court may be sustained. Martin v. Hunter's Lessee, 1 Wheat, 304.

2. The action of the Supreme Court of Georgia is more than a denial of the supremacy of the Constitution and this Court. It also means the destruction of the petitioner's rights under the Fourteenth Amendment of the federal Constitution.

This Court found last term that the State had conceded orally "that as a matter of substantive law Williams had been deprived of his constitutional rights." 349 U.S. at 390. That finding is not subject to collateral attack in the court below, as the State's Attorney General attempted to do, and it is not open to question at this stage of the proceeding. It is now part of the law of this case and it is the duty of the Georgia courts to give proper consideration and effect to that finding.

2/ "We need scarcely remark, that no Government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another . . . We regard the question as settled . . . that it belongs to the Federal courts to determine the question of their own jurisdiction, the ultimate arbiter, the supreme judicial tribunal of the nation . . ."
Freeman v. Howe, 24 How. 450, 459.

But the Georgia Supreme Court has chosen to ignore this crucial finding and has refused to reconsider the case in light of that finding. It has done so under the guise of asserting the State's sovereign powers under the Tenth Amendment. But since those powers are necessarily subordinate to federal powers and rights, such an assertion cannot be respected. If in fact, as the State has conceded, the petitioner's right to the equal protection of the laws has been violated by the system of selecting the petit jury panel, no appeal to the Tenth Amendment can destroy that right or justify ignoring the admitted violation.

What the action of the court below means is that, by ignoring this Court's mandate, the Georgia courts are refusing to provide any remedy for an admitted violation of a federal constitutional right. The basis of this Court's jurisdiction over the case thus becomes evident once again - its jurisdiction to decide "whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right". 349 U.S. at 383. And certainly the arbitrary refusal of the court below to respect this Court's action or to provide some form of relief "does not deprive this Court of jurisdiction to find that the substantive issue is properly before us". 349 U.S. at 389.

This case involves far more than a failure to raise a federal issue at the proper time. It involves extraordinary circumstances which outweigh the procedural failure, circumstances which were thoroughly considered by this Court last term. And it now involves the supremacy of the federal constitutional system and the authority of this Court. But even more importantly, it involves a man's life and his right to the equal protection of the laws. Since that right has been clearly and admittedly violated and since the Georgia court refuses to grant him any kind of relief, it becomes incumbent on this Court to exercise its jurisdiction over the substantive issue and provide direct and effective relief.

3. Inasmuch as the Supreme Court of Georiga has refused to obey the mandate of this Court and to give further consideration to the case, petitioner urges that this Court now invoke its jurisdiction over the substantive issue, determine that petitioner's right to the equal protection of the laws has been admittedly violated, and conclude that the judgment of conviction cannot stand. Avery v. Georgia, 345 U.S. 559.

Such direct action is appropriate under these circumstances and

is well within this Court's power. In Martin v. Hunter's Lessee, 1 Wheat. 304, 353, where the original mandate of the Court had been ignored, it was recognized that "the Supreme Court, instead of remanding the cause for a final decision, as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution". And in Magwire v. Tyler, 17 Wall. 253, this Court found that the decree of the state court on the remand of the case (8 Wall 650) "in effect evades the directions given by this Court, and practically reverses the judgment and decree which the mandate directed them to execute". The Court then said that "judging from the proceedings of the State court under the former mandate ... it seems to be quite useless to remand the case a second time." The Court accordingly proceeded to a final decision on the merits of the federal issue and awarded execution to the prevailing party. The same course of action is appropriate in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and appropriate relief accorded the petitioner.

Respectfully submitted,

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APPENDIX A

Supreme Court of Georgia.

No. 18548, Williams v. The State.

Judgment of May 10, 1954,

adhered to July 15, 1955.

By the Court:

Duckworth, Chief Justice. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Constitution of the United States, 10th Amendment; Code Sec. 1-810. Even though executives and legislators, not being constitutional lawyers, might often overstep the foregoing unambiguous constitutional prohibition of Federal invasion of State jurisdiction, there can never be an acceptable excuse for judicial failure to strictly observe it. This Court bows to the Supreme Court on all Federal questions of law, but we will not supinely surrender sovereign powers of this State. In this case the opinion of the majority of that court recognizes that this court decided the case according to established rules of law, and that no Federal jurisdiction existed which would authorize that court to render a judgment either affirming or reversing the judgment of this court, which are the only judgments by that court that this court can constitutionally recognize.

The Supreme Court undertakes to remand the case for further consideration, and in its opinion has pointed to Georgia law vesting in the trial judge discretion in ruling upon an extraordinary motion for new trial, and apparently concluded therefrom that this court should reverse the trial court because that discretion was not exercised in the way the Supreme Court would have exercised it. We know and respect the universally recognized rule that the exercise of discretion never authorizes a violation or defiance of law. In this case, as pointed out to us, that law is that the question sought to be raised must be raised before trial and not otherwise.

Not in recognition of any jurisdiction of the Supreme Court to influence or in any manner to interfere with the functioning of this court on strictly State questions, but solely for the purpose of completing the record in this court in a case that was first decided by us in 1953, and to avoid further delay, we state that our opinion in Williams v. State, 210 Ga. 665

(82 S. E. 2d 217), is supported by sound and unchallenged law, conforms with the State and Federal Constitutions, and stands as the judgment of all seven of the Justices of this Court.

Judgment of affirmance rendered May 10, 1954, adhered to. All the Justices concur.

APPENDIX B

SUPREME COURT OF GEORGIA

Atlanta, July 15, 1955.

The Honorable Supereme Court met pursuant to adjournment. The following order was passed:

Aubry Williams v. The State.

Upon reconsideration of this case, pursuant to the direction contained in the Mandate and Opinion of the Supreme Court of the United States filed in this court in this case (that Court's case No. 412, October Term, 1954) on July 13, 1955, it is hereby ordered and adjudged that the judgment by this court rendered on May 10, 1954, be hereby adhered to. All the Justices concur.

APPENDIX C

AUBRY WILLIAMS,	:	No. 18, 548
Plaintiff in Error	:	IN THE SUPREME COURT OF
vs.	:	GEORGIA ON REMAND FROM
THE STATE OF GEORGIA,	:	THE SUPREME COURT OF
Defendant in Error	:	THE UNITED STATES

MOTION

For all reasons heretofore advanced by Plaintiff in error in the Extraordinary Motion for a New Trial and the Brief, and under the opinion of the Supreme Court of the United States in Case No. 412, October Term, 1954, opinion of Mr. Justice Frankfurter, delivered June 6, 1955, plaintiff in error respectfully moves that the Court reverse the judgment of the trial judge. Plaintiff in error further moves that the trial judge be directed to hear the Extraordinary Motion for a New Trial, and further instructed that if the evidence on the hearing is in substantial accord with the allegations in the Mation, a new trial be granted.

This 13th day of July, 1955.

Carter Goode,
Attorney at Law,
605 Ga. Savings Bank Bldg.
Atlanta, Ga.

Carter Goode
ATTORNEY FOR
PLAINTIFF IN ERROR

(Certificate of service omitted)

SUPREME COURT OF GEORGIA

Atlanta, July 15, 1955.

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Aubry Williams v. The State.

Upon consideration of the motion by counsel for the plaintiff in error for this court to reverse its judgment of May 10, 1954, in this case, under the opinion of the Supreme Court of the United States in that court's case No. 412, October Term, 1954, and, for this court to direct the trial judge to hear the extraordinary motion for a new trial, it is ordered that the said motion be hereby denied.

APPENDIX D

BRIEF OF ATTORNEY GENERAL ON REMAND

AUBRY WILLIAMS,	I	NO. 18548
Plaintiff in Error	I	ON REMAND TO SUPREME COURT OF GEORGIA FROM SUPREME COURT OF THE UNITED STATES
v.	I	
THE STATE,	I	
Defendant in Error	I	

BRIEF ON BEHALF OF DEFENDANT IN ERROR

STATEMENT OF THE CASE

Plaintiff in Error will be referred to here as the accused.

On March 10, 1953, the accused, a Negro, was convicted in Fulton Superior Court of murder, and sentenced to death. This Court affirmed on appeal as against several non-constitutional grounds. Williams v. State, 210 Ga. 207, 78 S. E. 2d 521. Subsequently thereto, an extraordinary motion for a new trial was filed, raising for the first time the assertion that the accused had been denied equal protection of the laws by the use of different colored jury slips by the Fulton Jury Commissioners, a practice condemned in Avery v. Georgia, 345, U. S. 599, 97 L. Ed. 1244, 73 S. Ct. 891. This motion was dismissed and the Court affirmed. Williams v. State, 210 Ga. 665, 82 S. E. 2d 217. The Supreme Court of the United States granted certiorari. 348 U.S. 854.

The case now comes to this Court upon remand by the Supreme Court for further consideration.

ARGUMENT AND CITATION OF AUTHORITIES

The basis for the remand by the Supreme Court is stated to be "an important factor which has intervened since the affirmance by the Georgia Supreme Court" - the "acknowledgment by the State before this Court that as a matter of substantive law Williams has been deprived of his constitutional rights", 1/ and an independent finding by the Supreme Court that under Georgia

1/ See majority opinion, pp. 15-16. This assertion is unfounded. On oral argument, counsel for the State conceded that had Williams raised the question as to the jury slips at the right time, he would have been entitled to appropriate relief under the Avery case. Since, however, Williams failed to raise the point, the right was waived. One who waives his rights can hardly be said to have "had them denied him."

decisions questions of the nature involved here have been entertained by the Georgia Courts, including this Court, on extraordinary motion, notwithstanding the fact that this Court held otherwise when the case was here on appeal. (210 Ga. 665).

The precedent for the remand, rather than a reversal, is the case of Patterson v. Alabama, 294 U. S. 600, 79 L. Ed. 1082, 55 S. Ct. 575. This case is obviously distinguishable. 2/

Firstly, the Supreme Court has sought to review decisions of this Court and evolve the rule that the power of Georgia Courts to entertain on extraordinary motion questions going to the disqualification of the panel of jurors is discretionary. The unassailable refutation is found in Mitchell v. State, 69 Ga. App. 771 (4) 26 S. E. 2d 663, where it was said:

> "The defect of a petit juror propter defectum is a ground for a challenge seasonably made, but is not a ground for new trial after verdict, even if the defendant was ignorant of such defect until after trial."

Lumpkin v. State, 152 Ga. 229 (7), 109 S. E. 664, held that the exclusion of certain classes of persons from the jury panel constitutes matters propter defectum.

The Georgia cases discussed by the Supreme Court where questions going to the disqualification of individual jurors were in issue all involved matters propter affectum or propter delictum. Matters propter affectum or propter delictum have always been held to be ground for new trial where they were not known until after verdict. The fifth and sixth headnotes in the Mitchell case read as follows:

2/ In the Patterson case, two joint defendants were tried separately. Both challenged the jury by identical motions and on identical evidence. In one case, the Alabama Supreme Court held that no proof of discrimination had been shown by the evidence, but the other case was dismissed because of failure to appeal in time. The United States Supreme Court reversed the holding as to the first case, holding that a sufficient showing had been made. The other case was remanded on the supposition that the Alabama Court might have considered the appeal in the other case had they not approached it with the idea in mind that the jury challenge was not good in law. In the instant case, this Court expressly recognized that the contention would have been good if made at the proper time (210 Ga., at p. 669) but held that it was powerless to review where the question was not properly raised.

"5. A defect propter affectum of a petit juror is a ground for challenge, and should be made before verdict if known to the defendant. Yet, if unknown to the defendant and he had exercised due diligence, such a defect may be cause for grant of a new trial.

"6. A defect propter delictum of a petit juror is a ground for challenge and should be made before verdict, if known to the defendant. Yet, if unknown to the defendant and he had exercised due diligence, such a defect may be cause for grant of a new trial."

The cases discussed by the Supreme Court were Wright v. Davis, 184 Ga. 846, 193 S. E. 757; Smith v. Georgia, 2 Ga. App. 574, 59 S. E. 311; Crawley v. State, 151 Ga. 818, 108 S. E. 238; and Doyal v. State, 73 Ga. 72.

By comparing the alleged grounds of disqualification in each of these cases with the definition of propter defectum, propter affectum, and propter delictum as found in the Mitchell case, at p. 777, et seq., it is readily apparent that these cases all involved situations where matters propter affectum or propter delictum were in issue, and not propter defectum as in the instant case.

It thus appears that the Supreme Court has misconstrued the Georgia law, and based on this error, remanded the case when otherwise the only course open to them would have been dismissal. The decision of a state court interpreting its laws is binding on the federal Supreme Court. Bodley v. Taylor, 5 Cr. 191, 3 L. Ed. 75; Luther v. Borden, 7 How. 1, 12 L. Ed. 581; Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; Albertson v. Milliard, 345 U. S. 242, 97 L. Ed. 983, 73 S. Ct. 600.

Questions of state practice are solely for determination by the state court (Central Vermont Ry. Co. v. White (1915) 238 U. S. 507, 513, 59 L. Ed. 1433, 1437, 35 S. Ct. 865; Delaware City, etc. v. Reybold (1892), 142 U.S. 636, 642, 35 L. Ed. 1141, 1144; West River Bridge Co. v. Dix, (1848) 6 How. 507, 535, 12 L. Ed. 535, 547) and present no federal question. Thorington v. City Council of Montgomery (1893) 147 U. S. 490, 37 L. Ed. 252, 13 S. Ct. 394; Buena Vista County v. Iowa Falls R. Co. (1884), 112 U. S. 165, 176, 28 L. Ed. 680, 684, 5 S. Ct. 84; Gibson v. Mississippi (1896) 162 U. S. 565, 591, 40 L. Ed.

1075, 1081-1082, 16 S. Ct. 904. The wisdom, expediency, or justice of the law of a state as declared by its courts are not questions for the federal courts to decide unless a constitutional right is violated. Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97, 29 S. Ct. 14. The federal court must accept the state court's decision although it seems incorrect. Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. Ed. 595.

It is therefore evident that the decision of the Supreme Court was based upon an erroneous interpretation of Georgia law. Under the Mitchell decision, the power of the trial courts to entertain and of this Court to review, questions going to the disqualification of jurors, is not a matter of discretion, but of power.

Lastly, at page 14 of its opinion, the Supreme Court, in support of its contention that consideration of the errors involved is a matter of discretion, refers to the fact that the opinion of this court went into the question as to the sufficiency of the affidavits. It was stated that "If the trial court had no power to entertain the motion, it was immaterial whether the affidavits were faulty." The Court here misconstrued the effect of this holding. As we view it, this Court was merely citing another reason why the extraordinary motion could not be considered. The question of affidavits has nothing whatever to do with the merits, and is a procedural requirement which must be disposed of in any case before the substantive allegations of the motion can be considered.

CONCLUSION

This Court has no choice but to reaffirm its decision as laid down in Williams v. State, supra.

Respectfully submitted,

/s/ Eugene Cook
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The Attorney General

/s/ Robert H. Hall
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SUPREME COURT OF THE UNITED STATES

October Term, 1955

Office - Supreme Court, U.S.
FILED
NOV 4 1955
HAROLD B. WILLEY, Clerk

No. 328-Misc.

AUBRY WILLIAMS, Petitioner

v.

STATE OF GEORGIA, Respondent

On petition for a writ of certiorari
to the Supreme Court of Georgia

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION

I.

Respondent adopts so much of the Consolidated Petition for Certiorari and Brief as are denominated "Opinion Below" and "Jurisdiction".

II.

QUESTION PRESENTED

Where this Court remands a case to the highest state court below, without a direction that the case be either affirmed or reversed, but merely with direction that it be reconsidered in the light of events transpiring subsequent to the state court's decision, whether or not a second appeal by way of certiorari will be entertained by this Court when it manifestly appears, both from the State Court's judgment and its opinion, that reconsideration was given thereto in due compliance with the mandate of this Court.

III.

STATEMENT

The facts in this case are so well known to the Court that for the sake of brevity they will not be restated here.

IV.

ARGUMENT AND CITATION OF AUTHORITIES

When the instant case was remanded to the Supreme Court of Georgia, neither the opinion of this Court, nor its judgment,

directed that the case be either reversed or affirmed.

The mandate issued to the Georgia Supreme Court provided:

> "It is ordered by this Court that this cause be, and the same is hereby, remanded to the Supreme Court of Georgia for reconsideration in the light of the opinion of this Court ..."

Likewise, the opinion of this Court did not direct the State Supreme Court to do anything with the case but "reconsider" it in light of an asserted admission by counsel for Georgia on oral argument that petitioner had been denied his constitutional rights. In relying upon Patterson v. Alabama, 294 U. S. 600, 79 L. Ed. 1082, 55 S. Ct. 575, this Court quoted therefrom language which clearly discloses the nature of the remand, viz.:

> '"We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. . . . We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a nonfederal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case . . ."." (349 U. S. at 390).

The majority opinion then proceeded to review various Georgia cases, evolving therefrom a conclusion that the rule of Georgia procedure requiring that challenges to the array be made prior to trial, is in effect, a rule subject to discretion, and not a matter of jurisdiction or power. This Court therefore found an analogy with the Patterson case, supra, and apparently determined that the Georgia Supreme Court should be permitted an opportunity to reconsider.

Had this Court actually determined that Petitioner's constitutional rights had been denied him and a federal question improperly disregarded, it goes without saying that this Court would have reversed, rather than simply remand for reconsideration -- any other interpretation would inject senseless circuity of action into a case which already had made the full rounds of judicial review. The very fact that the case was remanded for reconsideration rather than reversal evinces an attitude that choice - i.e.,

the authority to decide one way or another was implicit in the remand.

In the light of this interpretation, we now turn to the disposition of the case by the Georgia Supreme Court upon remand, and at the outset, are met with the unambiguous words of the Georgia Court's judgment, to wit:

> "Upon reconsideration of this case, pursuant to the direction contained in the mandate and opinion of the Supreme Court of the United States filed in this Court in this case (that Court's case no. 412, October Term, 1954) on July 13, 1955, it is hereby ordered and adjudged that the judgment by this Court rendered on May 10, 1954, be hereby adhered to . . ." (emphasis supplied)

If this be not enough, reference is made to the written opinion of the Georgia Supreme Court, which by analogy with Clark v. Williard (1934) 292 U. S. 112, 118, 78 L. Ed. 1160, 1164, 54 S. Ct. 615, (holding that the opinion of a court below may be looked to as well as its judgment to determine finality for purposes of appeal), we submit may also be looked to in determining whether the mandate of this Court was carried out wherein the Georgia Court was directed to "reconsider". 1/ The opinion delivered by Chief Justice Duckworth, declared, inter alia:

> "We know and respect the universally recognized rule that the exercise of discretion never authorizes a violation or defiance of law. In this case as pointed out by us, that law is that the question sought to be raised must be raised before trial and not otherwise." (emphasis supplied)

If this be not a reconsideration of the controlling question in this case, we are at a loss for a proper name by which to call it. The Court is here saying that under Georgia law, it is a matter of power, rather than discretion, where it is sought to raise a constitutional question of this nature after trial.

We do not construe the majority opinion of this Court as undertaking to decide once and for all, as a matter of state procedure, that such questions could, in the discretion of the trial court, be raised after trial, thereby depriving the Georgia Supreme

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1/. See also Indiana ex rel Anderson v. Brand, 303 U. S. 95, 82 L. Ed. 685, 58 S. Ct. 443, 113 ALR 1482; Dible v. Bellingham Bay Land Co., 163 U. S. 63, 41 L. Ed. 72, 16 S. Ct. 939; Fire Assoc. of Philadelphia v. New York, 119 U. S. 110, 30 L. Ed. 342, 7 S. Ct. 108.

Court of the privilege of making an independent appraisal of its own decisions. We merely interpret this Court's opinion as applying the principle of the Patterson case, supra, which is to the effect that where some unusual occurrence has supervened since judgment, the Supreme Court will review state decisions to determine so far as practiable, whether power to consider exists, and if in so doing the Court finds reasonable ground to believe that such power does exist, it will exercise its appellate jurisdiction to the extent of remanding so as to give the state court an opportunity of reviewing its decision in the light of the supervening facts with the power to thereafter reverse or affirm, as it may see fit.

Obviously, the power to decide whether a federal question exists is for this Court alone to determine, [2] and we sincerely share learned counsel's convictions as to the need for all federal questions to be determined by this Court rather than forty-eight different state courts, but that is not the issue in this case. Whether the Georgia Supreme Court has power vel non to consider any given question must of necessity be determined by that court and no other. To hold otherwise would revolutionize existing principles of state-federal relationship.

At every stage of the proceeding, we directed this Court's attention to the cases of Mitchell v. State, 69 Ga. App. 771 (4), 26 S. E. 2d. 663, and Lumpkin v. State, 152 Ga. 229 (7), 109 S. E. 664, which we urged were controlling in this case and which showed beyond all doubt that challenges to the array, as a matter of judicial power, could not be considered after trial. [3] As was pointed out in the brief filed on behalf of the State before the Georgia Supreme Court upon remand (See Petition for Certiorari,

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2/. Kovacs v. Cooper, 336 U. S. 77, 93 L. Ed. 513, 69 S. Ct. 448; Lovell v. Griffin, 303 U. S. 444, 82 L. Ed. 949, 58 S. Ct. 666; Honeyman v. Hanan, 300 U. S. 14, 81 L. Ed. 476, 57 S. Ct. 350; (even as against certificate of state appellate court); Newport Light Co. v. Newport, 151 U. S. 527, 38 L. Ed. 259, 14 S. Ct. 429.

3/. The Mitchell and Lumpkin cases were cited and quoted from at length in the first brief filed in opposition to the petition for certiorari, pp. 3-4; in the brief filed on the writ itself, p. 7, and lastly, in that part of the oral argument delivered by Assistant Attorney General Freeman Leverett.

Appendix D, p. 2) the Mitchell case, supra, held that any objection propter defectum could not be raised after trial; that the Lumpkin case, supra, held that the exclusion of certain classes of persons constitutes matters propter defectum; and lastly, that the Mitchell case clearly pointed out that errors propter affectum or propter delictum could be raised after trial in certain instances, which plainly distinguishes the Georgia cases referred to by this Court in its majority opinion, all of which involved errors propter affectum and propter delictum, rather than errors propter defectum as does the present case.

Therefore, it having been clearly shown that due consideration was given by the Georgia Supreme Court on remand pursuant to the mandate of this Court, a second appeal (by way of certiorari) does not lie. Stewart v. Salamon, 97 U. S. 361, 24 L. Ed. 1044; Humphrey v. Baker, 103 U. S. 736, 26 L. Ed. 456; Aspen Min. & Smelting Co. v. Billings, 150 U. S. 31, 37, 37 L. Ed. 986, 988, 14 S. Ct. 4; United States v. New York Indians, 173 U. S. 464, 43 L. Ed. 769, 19 S. Ct. 464; Mackall v. Richards, 116 U. S. 45, 29 L. Ed. 558, 6 S. Ct. 234; Texas & P. R. Co. v. Anderson, 149 U. S. 237, 242, 37 L. Ed. 717, 719, 13 S. Ct. 843.

In the Salamon case, this Court remarked:

> "An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court, in exact accordance with the mandate of this court upon a previous appeal. If such an appeal is taken, this court will, upon the application of the appellee, examine the decree entered and, if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded with appropriate directions for the correction of the error. The same rule applies to writs of error."

A second writ of error brings up only the proceedings subsequent to the mandate, and if they conform thereto, the appeal will be dismissed with costs. United States v. New York Indians, supra, (173 U. S. at p. 472).

Moreover, in view of this Court's disposition to decide cases on the basis of concessions by counsel in oral argument, we call the Court's attention to an admission by the very able counsel who represented petitioner as amicus curiae, which was to the effect that in his opinion, this Court was only empowered to remand

for reconsideration and not reversed. Since this was done, it is submitted that his concession should control in the same manner that the concession of respondent was held to require a remand.

In that part of the petition and brief entitled "Reasons for Granting The Writ", (pp. 6-10), the entire argument of six pages is devoted to the unique proposition that this Court should grant the writ in view of the Georgia Supreme Court's disagreement with this Court over interpretation of the Tenth Amendment, and its use of rather strong language in expressing such disapproval. Because we believe that pride of conviction and independence of mind is something to be expected in such rugged individuals as lawyers and judges - particularly in the field of constitutional law - we do not consider it a manifestation of impropriety to note that on frequent occasions members of this Court have evaluated the opinions of their bretheren in tones hardly characteristic of congenial endearment.

Lastly, since it clearly appears that the Georgia Supreme Court adhered to the mandate of this Court, the fact that in so doing it may have announced disagreement with this Court over the interpretation of the Tenth Amendment is just about as constitutionally irrelevant (to paraphrase learned counsel for petitioner) as disagreement over who should have won the World Series.

CONCLUSION

The rule that state court decisions refusing to consider federal constitutional claims because of failure to properly raise them under state procedure presents no federal question, necessarily assumes that the rights were "denied" in the sense that had they been properly raised, a different result would have ensued; otherwise, the rule would have no meaning at all. We fully recognize that unusual circumstances justify the principle enunciated in the Patterson case, but we earnestly insist that in any event, it has no application after the state court has finally reconsidered. It simply does not comport with common sense to say that every time a new principle of law is established by this court, it is to be given an ex post facto application, denied even to acts of the legislature, and all prior cases searched out, exhumed, and remolded

We submit that the Fourteenth Amendment does not guarantee anyone a perfect trial - it only enjoins that every accused has the right to a fair trial. Constitutional rights must be asserted, and like all others, may be waived. The procedural requirement that their assertion be timely is not a technical trap for the unwary - it is a rule of necessity born of experience.

The very idea of "rights" embraces as a necessary concomitant, the existence of an organized government capable of vindicating them, and however compelling the considerations where life is involved, unless these rules are given continued recognition and application, the overzealous quest for consummate justice may well destroy the constituted authority which undertook the protection of all rights in the first instance.

Respectfully submitted,

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